



THE UNIVERSITY *of* EDINBURGH

Edinburgh Research Explorer

Seen But Not Heard?

Citation for published version:

Cowan, S, Baillot, H & Munro, V 2009, 'Seen But Not Heard? Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts', *Journal of Law and Society*, vol. 36, no. 2, pp. 195-219. <https://doi.org/10.1111/j.1467-6478.2009.00463.x>

Digital Object Identifier (DOI):

[10.1111/j.1467-6478.2009.00463.x](https://doi.org/10.1111/j.1467-6478.2009.00463.x)

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

Journal of Law and Society

Publisher Rights Statement:

© The Authors (2009). This is a post-peer-review, pre-copyedited version of an article published in Journal of Law and Society. The definitive version is available at www3.interscience.wiley.com

General rights

Copyright for the publications made accessible via the Edinburgh Research Explorer is retained by the author(s) and / or other copyright owners and it is a condition of accessing these publications that users recognise and abide by the legal requirements associated with these rights.

Take down policy

The University of Edinburgh has made every reasonable effort to ensure that Edinburgh Research Explorer content complies with UK legislation. If you believe that the public display of this file breaches copyright please contact openaccess@ed.ac.uk providing details, and we will remove access to the work immediately and investigate your claim.



**Seen but not Heard? Parallels and Dissonances in the
Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts**

Helen Baillot, Sharon Cowan & Vanessa E. Munro

Abstract

Exact figures are elusive, but it has been suggested that a significant proportion of those women seeking refugee status in the UK will claim to have been raped in their country of origin. Even where this allegation does not form the sole basis of a woman's asylum claim, it may be relevant to the determination of refugee status, particularly with regard to the seriousness of the harm suffered and the prospect for her safe return 'home'. While criminal justice responses to rape have been the subject of extensive academic criticism and legislative reform, the parallel and yet contextually specific processes of disclosure and credibility assessment in the asylum context have received little attention. In this article, the authors embark upon a preliminary exploration of possible parallels and dissonances in the treatment of rape across the asylum and criminal justice contexts, drawing in particular on the findings of a pilot study conducted in one urban geographical centre in late 2007. The article considers the extent to which problems identified in the criminal justice system – namely, the under-reporting of rape, the inability of the victim to 'tell the story' in her own words, the existence of a hostile adjudicative environment, and the tendency to see factors such as late disclosure, narrative inconsistency and calm demeanour as necessarily contra-indicative of veracity – may be replicated and compounded in asylum cases. Reflecting on the challenges that may be faced by asylum-seeking women whose narratives involve a rape claim, it also acknowledges the complex intersection of race, gender, culture and nationality in this context.

Seen but not Heard? Parallels and Dissonances in the Treatment of Rape Narratives across the Asylum and Criminal Justice Contexts

*Helen Baillot, Sharon Cowan & Vanessa E. Munro**

Despite ongoing reform of substantive and procedural sexual offences laws in the UK,¹ concerns continue to be expressed about the legal processing of rape cases. Research has challenged the presence of institutionalised mythologies about the (in)credibility of a woman's claim of rape and has highlighted the high rate of attrition as rape cases 'fall out' of the formal criminal justice system.² Critical attention has also focused on the public perception of rape victims. Problematic views on responsibility for sexual assault have been highlighted and it has been argued that, alongside law reform, social attitudes about rape and gender roles must shift if we are to achieve justice for female victims.³

Against this backdrop of scrutiny and concern in the criminal justice context, the authors sought to evaluate another area of social justice where a claim of rape may have an important part to play. A pilot study was undertaken to examine the situation faced by female asylum-seekers who, in claiming refugee status in the UK, report having been raped in their country of origin as part of the grounding for their claim to persecution (or well-founded fear thereof). Though not the subject of sustained attention to date, the treatment of disclosures of sexual violence in the asylum context is important, both for what it tells us about the parallels and dissonances with the treatment of rape in the criminal justice context and for what it might exemplify in relation to asylum decision-making more broadly. Even if a woman's alleged experience of rape does not form the sole basis of her asylum claim, it may nonetheless be relevant to a host of vital asylum-

* Helen Baillot is an independent researcher who has worked with asylum claimants for a number of years; Sharon Cowan is a Lecturer in the School of Law at the University of Edinburgh; and Vanessa Munro is Professor of Socio-Legal Studies in the School of Law at the University of Nottingham. Thanks are due to The Clark Foundation for Legal Education and the University of Edinburgh Development Trust Research Fund for financing this pilot study. The authors would also like to thank those participants who agreed to be interviewed over the course of the study.

¹ The substantive law of rape in England and Wales was reformed by the Sexual Offences Act 2003 [for background, see 'Setting the Boundaries: Reforming the Law on Sexual Offences' (London: Home Office, 2000) and 'Protecting the Public' (Cm 5668) (London, HMSO: 2002)] and in 2008, the Scottish Law Commission produced a draft Bill to generate similar reforms. The Crown Office & Procurator Fiscal Service (Scotland) and the HM Inspectorate of Constabulary & HM Crown Prosecution Service Inspectorate (England & Wales) have produced reports critical of the investigation and prosecution of rape in their respective jurisdictions – 'Review of the Investigation and Prosecution of Sexual Offences in Scotland: Report & Recommendations' (Edinburgh: COPFS, 2006); 'Without Consent: A Report on the Joint Inspection into the Investigation and Prosecution of Cases Involving Allegations of Rape' (London: HMCPSI, 2007).

² For further discussion, see, for example, Kelly et al, 'A Gap or a Chasm?: Attrition in Reported Rape Cases' (Home Office Research Study 293) (London: Home Office, 2005); Temkin, *Rape and the Legal Process* (2nd Ed) (Oxford: OUP, 2002); and 'Convicting Rapists and Protecting Victims – Justice for Victims of Rape' (London: Home Office, 2006).

³ In England and Wales, see Amnesty International, 'Sexual Assault Research: Summary of Findings' (Prepared by ICM, 2005); Finch & Munro, 'The Demon Drink and the Demonised Woman: Socio-Sexual Stereotypes and Responsibility Attribution in Rape Trials Involving Intoxicants' (2007) 16 *Social and Legal Studies* 591; and Temkin & Krahe, *Sexual Assault and the Justice Gap* (Oxford: Hart Publishing, 2008). A recent survey in Scotland revealed parallel results - see 'Domestic Abuse 2006/7: Post Campaign Evaluation' (Edinburgh: Scottish Executive, 2007).

related considerations, including the seriousness of the harm previously suffered and the prospects for her safe return to the country, if not to the place, of her original residence.

The study of asylum law, policy and practice by sociologists, anthropologists, lawyers and others has yielded rich and valuable data,⁴ but the treatment of women asylum-seekers who claim to have been raped is a relatively unexplored area. Because the contemporary social and legal focus upon rape occurs in the criminal justice context, the parallel and yet contextually specific processes of disclosure and credibility assessment in the asylum system have received comparatively little attention.⁵ The premise of the present research is that the intersection of race, gender, culture and nationality may present distinct challenges to women asylum-seekers for whom a claim of rape is a feature of their application. Though necessarily limited by scale, the pilot study discussed here offers valuable insights into this under-theorised and under-researched area. Moreover, while there is clearly a need for a larger, more in-depth study, this article reflects on some of the tentative conclusions that can nonetheless be drawn about the specific problems experienced by women seeking asylum in the UK whose narratives involve a rape claim.

We begin by briefly setting out the international context of asylum claims, with reference to the 1951 Geneva Convention on the Status of Refugees, as well as to the domestic asylum system in the UK (including an examination of recent shifts in its implementation). We then turn to the issue of sexual violence in the asylum context, highlighting the value of engaging in research on this issue, and situating the focus of the pilot in the broader context of the pre-existing literature. The specific aims and method of our project are outlined before its key findings are presented. We examine the extent to which problems identified in the criminal justice system – namely, the under-reporting of rape, the inability of the victim to ‘tell the story’ in her own words, the existence of a hostile adjudicative environment, and the tendency to see factors such as late disclosure, narrative inconsistency and calm demeanour as necessarily contra-indicative of veracity – may be paralleled, and compounded, in asylum cases. We conclude, perhaps predictably, by calling for better support for asylum-seeking women who have experienced sexual violence and for more research in this area. In particular, we highlight the need for systematic, end-to-end tracking of asylum cases to better understand (especially given the limited transparency of the process) the ways in which claimant credibility is determined.

Asylum in the UK

The International Context

The primary international legal instrument regulating asylum claims and determinations of refugee status is the 1951 Geneva Convention relating to the Status of Refugees (the Refugee Convention), as subsequently amended – in terms of its temporal and geographical limits – by the 1967 Protocol. Extensive literature has been produced outlining the origins of the Refugee Convention, situating it firmly within the post-war human rights movement.⁶ The Convention remains the basic text to which UK decision-

⁴ See, for example, Gibney, *The Ethics and Politics of Asylum* (Cambridge: CUP, 2004) and Goodwin-Gill & McAdam, *The Refugee in International Law* (Oxford: OUP, 2007).

⁵ Similar concerns about the marginalisation of asylum-seeking women were raised by Asylum Aid in its 2007 ‘Response to Priorities for the Ministers for Women’ – www.asylumaid.org.uk

⁶ See, for example, Steinbock, ‘The Refugee Definition as Law: Issues of Interpretation’ and Tuitt, ‘Rethinking the Refugee Concept’, both in Nicholson & Twomey (eds) *Refugee Rights and Realities* (Cambridge: CUP, 1999).

makers and adjudicators must refer when assessing the refugee status of asylum applicants. Unlike many other international human rights law instruments, it can be of direct and concrete use to those who have fled their countries of origin and arrive in Great Britain. Having made a claim for asylum, applicants are protected by the doctrine of *non-refoulement*, as enshrined in Article 33.⁷ This doctrine, which is now widely accepted to be a principle of customary international law,⁸ precludes the state from taking any action that would result in those fleeing persecution being returned to territories where they would face further harm.⁹ While this protection has led Steinbock to argue that the Refugee Convention may be one of the human rights movement's most powerful tools,¹⁰ it is important to emphasise that those who have claimed asylum but have not yet been recognised as refugees ('asylum-seekers') do not benefit from the Convention's other substantive provisions, including those governing access to employment and welfare. Asylum-seekers remain liable to detention while their claim is under consideration, and the UK government will seek to return those who are unsuccessful to their countries of origin. Thus, the full protection of the Convention is limited to those asylum applicants who can prove that they meet the definition of a refugee laid down within Article 1A:

“...a person who...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”

The continuing validity of this definition, and the often restrictive and inconsistent interpretations given to it by signatory states, has been brought into question in recent years. Constructed as it was to defend citizens against the machinations of a brutal but well-organised state, some commentators argue that the Convention does not appropriately relate to the geo-political realities of the modern world, in which random and uncontrolled violence are far more likely to cause people to flee their homelands.¹¹ Specifically regarding female asylum applicants, moreover, many commentators have emphasised the Convention's deficiencies. These include the potential exclusion of women's 'private' persecution from the enumerated Convention grounds and the failure to recognise women's acts of societal defiance as 'political,' as well as the dangerous tendency to categorise female applicants as the vulnerable, passive victims of male oppression. It has also been argued that it may be more difficult for women to meet the

⁷ This clause states that “No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

⁸ Lauterpacht & Bethlehem, *The Scope and Content of the Principle of Non-Refoulement* (UNHCR: 20/06/01) at 2 – 5 & 61 – 70.

⁹ Article 33 is generally held to extend protection to all those who make a claim under the Convention, regardless of whether or not they have been formally recognised as refugees through a government's own administrative or legal processes. The only claimants excluded from its reach are those who pose a risk to national security or danger to the community (Article 33 (2)). See Lauterpacht & Bethlehem, above note 8 at 72.

¹⁰ Steinbock, above note 6 at 20.

¹¹ Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 *International Journal of Refugee Law* 238.

requirement of ‘alienage’ from one’s country of nationality, since women are “less able to conquer space to enable movement towards safety than their male counterparts.”¹²

Other legal remedies do allow for recognition and (at least partial) redress of some of the Convention’s omissions. For those who do not meet the Refugee Convention definition, European human rights mechanisms – particularly under Article 3 (freedom from torture and inhuman or degrading treatment) and Article 8 (respect for family and private life) – may, for example, give rise to either Humanitarian Protection or Discretionary Leave.¹³ In addition, concerns about ‘asylum shopping’ between EU countries has prompted the Council of Ministers to produce, in 2004, both the Qualification Directive and Reception Directive. The former of these has been particularly welcomed by commentators as consolidating relatively progressive national case law in some of the Convention’s ‘grey areas’ and offering – on paper – a remedy to many of the deficiencies described above.¹⁴ However, asylum claimants granted a form of ‘subsidiary protection’ under one of these legal instruments will not enjoy the full range of rights and guarantees afforded to the Convention Refugee, particularly as regards access to integration programmes. The primacy of the Refugee Convention definition thus remains a legal and practical reality.

The UK Context

Unlike in Canada where an independent body takes decisions regarding a person’s right to be recognised as a refugee, in the UK the body responsible for initially determining asylum claims is the UK Border Agency (formerly the Border and Immigration Agency), which is a department of the Home Office. In contrast to the previous UK system where decision-making was centralised in one geographical site, in March 2007 a New Asylum Model that functions according to ‘regional’ case ownership was implemented.¹⁵ Having claimed asylum at a point of entry or an asylum screening unit, an applicant is assigned to a case-owner in one of 12 regions. Following a series of face to face interviews with the applicant, this case-owner will take the initial decision (at local level) as to whether to recognise an applicant as a refugee, or to grant some other form of leave to remain. This decision will be taken with reference both to the international legislation described above as well as to national legislation and other guidance documents such as the UK Immigration Rules and the Asylum Policy Instructions issued by the UK Border Agency.

If the Home Office refuses the initial claim for asylum, applicants will, in the majority of cases, benefit from an in-country right of appeal to the Asylum and Immigration

¹² Tuitt, above note 6 at 112. For further discussion, see also Greatbach, ‘The Gender Difference: Feminist Critiques of Refugee Discourse’ (1989) 1 *International Journal of Refugee Law* 518; Crawley, *Refuge and Gender: Law and Process* (Bristol: Jordan Publishing, 2001); Spijkerboer, *Gender and Refugee Status* (Aldershot: Ashgate, 2000); D. Anker, ‘Refugee Law, Gender and the Human Rights Paradigm’ (2001) 15 *Harvard Human Rights Journal* 133; and Kneebone, ‘Women Within the Refugee Construct: Exclusionary Inclusion in Policy and Practice – The Australian Experience’ (2005) 17 *International Journal of Refugee Law* 7.

¹³ Key case law in this area includes: *Soering v. UK* (1989) ECHR 14038/88; *Chahal v. UK* (1997) 23 EHRR 413; *Huang (FC) v. SSHD* 2007 UKHL 11.

¹⁴ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted. For discussion, see Symes ‘The EU Refugee Qualification Directive,’ Paper presented at *On Asylum, Migration and Human Rights* Conference, Durham (2006).

¹⁵ Despite devolution, Scotland and Wales are defined as ‘regions’ within the asylum process.

Tribunal (AIT). The AIT is part of the wider tribunal system which operates in the UK to hear challenges to decisions taken by statutory bodies. Since April 2005, immigration judges sitting at the AIT have heard all appeals against initial refusals of asylum by Home Office decision-makers.¹⁶ During the appeal, applicants may be questioned on the detail of their claim by a Home Office representative. This questioning, and the judge's reaction to it, will form part of the final determination in each case. At stake is the decision to either overturn the initial refusal, thus granting an applicant the right to stay in the UK, or authorising her removal to her country of origin by Immigration Services.

Throughout this process, female applicants theoretically benefit from policy guidelines regarding gender-related asylum claims. Inspired by the development of relatively enlightened guidance in Australia and Canada,¹⁷ a coalition of academics and voluntary sector representatives (embodied by the Refugee Women's Legal Group and supporters) began to lobby for the introduction of something similar in the UK in the 1990s. Without this, the group felt that women asylum claimants in the UK would be disadvantaged by a lack of awareness concerning the particularities of female claims and by gender-discriminatory procedural barriers. The first such UK guidelines were adopted in 2000 by the Immigration Appellate Authority (now Asylum and Immigration Tribunal), with content that had been heavily influenced by the Australian and Canadian documents and guidelines developed by the Refugee Women's Legal Group in 1998.¹⁸

The notion that gender was of importance in the determination of asylum claims was recognised and consolidated in 2002 with the publication of the UNHCR's own guidelines on gender-related persecution.¹⁹ However, it was only in 2004 that the UK Home Office introduced a specific Asylum Policy Instruction for its case-workers.²⁰ In broad terms, these guidelines recognise that the refugee definition has traditionally been adjudicated upon through a 'framework of male experiences,' thus disadvantaging female claimants.²¹ All of these various national and international documents make specific reference to facilitating and contextualising disclosures of rape and sexual violence; and within them sexual violence is clearly identified as both a gender-related form of persecution and a violation of international human rights law. Importantly, moreover, such guidelines give not only legal but also procedural guidance to decision-makers in relation to dealing sensitively and appropriately with women's narratives of persecution.

Despite this, the extent to which these guidelines have had any sustained and consistent effect on operational practice has been disputed. Research conducted in 2006, for

¹⁶ Section 26 of the *Asylum and Immigration (Treatment of Claimants) Act 2004* created the current AIT, which came into being on 1st April 2005 and effectively merged the previous two tier adjudicator and tribunal stages into a one-tier appeals system.

¹⁷ *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers* (Department of Immigration and Humanitarian Affairs, Australia July 1996); *Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Immigration and Refugee Board, Canada 13 November 1996).

¹⁸ *Asylum Gender Guidelines* Immigration Appellate Authority 2000.

¹⁹ *Guidelines on International Protection: Gender-related Persecution within the context of Article 1a(2) of its 1951 Convention and/or its 1967 Protocol Related to the Status of Refugees* (UNHCR, 7 May 2002).

²⁰ Asylum Policy Instructions: Gender Issues in the Asylum Claim' (Home Office, 2006) – at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumpolicyinstructions/>

²¹ Above note 19.

example, suggested that the UK's Asylum Policy Instruction was rarely followed.²² Meanwhile, the gender guidelines specific to the appellate hearing process were recently removed from the Asylum and Immigration Tribunal's website, alongside a denial that they had ever been official policy. This is clearly problematic, although it is important to note that year on year, female main applicants are slightly *more* likely than their male counterparts to be successful in their asylum claims.²³ As with men, however, it remains the case that the majority of women will have their claims refused at initial decision-making. Guidelines may exist to protect women claimants, but critics have maintained that this by no means guarantees a sympathetic or holistic assessment of their claims.

Having provided this brief outline of the overall structure of the contemporary UK asylum process, we move now to examine the need to focus on the treatment of asylum-seeking women who report an incident of rape as part of their claim, and describe the way in which we designed this pilot study to address some current gaps in the literature.

Rape and Asylum – What's the Problem?

For many female asylum applicants, rape will form a part of the narrative as to why she fled her country of origin and potentially also the basis upon which she claims a well-founded fear of persecution in the event of her return "home". In the absence of official statistics, it has been estimated that between 25% and 50% of female asylum applicants in the UK will claim to have experienced rape.²⁴ Interviewees in the present study went so far as to contend that as many as 80% or 90% of women from certain countries of origin may have experienced rape or other forms of serious sexual violence and abuse.²⁵ At the same time, Home Office statistics suggest that the majority of female claimants (71% in 2007) are refused asylum or any other form of humanitarian / discretionary leave to remain on first application, and that the vast majority will subsequently appeal against this decision. There is reason to suspect, therefore, that a significant number of those female applicants who appear before the AIT will claim to have experienced rape.

There is a wealth of literature analysing the processes of cross-examination and credibility assessment faced by those who allege rape under national criminal law but this body of work has tended to ignore the issue as it arises during the asylum process, thereby reinforcing the exclusion of female migrants from mainstream feminist analyses

²² Ceneda & Palmer, 'Lip Service or Implementation? Home Office Gender Guidance and Women Asylum Seekers' (London: Asylum Aid, 2006).

²³ In 2003, 19% of women as compared to 16% of men were granted some form of leave to remain after initial decision-making. In 2004, the differential was even more marked, with 18% of women as opposed to 11% of men granted either Refugee Status, Humanitarian Protection or Discretionary Leave. In 2005, the figures were 21% for women compared to only 16% of men while in 2006, the figures were 23% for women compared to 21% for men. See Home Office Statistical Bulletin: Asylum Statistics United Kingdom 2003, 2004, 2005, 2006, available at <http://www.homeoffice.gov.uk/rds>.

²⁴ Ceneda, 'Women Asylum Seekers in the UK: A Gender Perspective' (London: Asylum Aid, 2003); Grant, 'Raped, Tortured but Denied Asylum by the UK Home Office' *The Voice* 12th July 2006.

²⁵ Although this study focuses on female claimants, it should be noted that reports of rape are also prevalent amongst male asylum-seekers. Of those male claimants referred to Medical Foundation for Victims of Torture over an 18-month period, 25% had been sexually assaulted whilst imprisoned in their country of origin. Again, sexual violence against males is more prevalent in certain countries – see Peel, *Rape and a Method of Torture* (London: Medical Foundation, 2004).

of sexual assault.²⁶ In addition, contemporary academic studies of the problems facing asylum claimants - and even those that specifically consider the gender implications of the asylum system - have failed to fully address the particular hurdles that may be faced by women applicants whose claims involve an allegation of rape. The Refugee Women's Resource Project at Asylum Aid has produced detailed recommendations about the appropriate governmental and legal treatment of asylum-seeking women who have faced violence; and in 2006, the Black Women's Rape Action Project and Women Against Rape produced a report about the improper use of international law and guidelines on asylum in cases where women claimed to have been raped.²⁷ Though important and instructive, both of these reports have been written primarily from a campaigners' perspective. They have also typically focussed on the initial asylum decision (c.f. AIT hearing) and so - in contrast to this study - have rarely drawn on feminist analyses of courtroom practices to explore the ways in which women's narratives about rape may be responded to and evaluated, both by legal representatives and asylum adjudicators.

Unlike criminal rape trials, AIT hearings are not officially transcribed or routinely reported. As such, we lack understanding of the processes by which narratives about rape are constructed and presented, as well as about how their credibility is determined, in this context. The authors undertook this pilot to begin to redress these gaps and to provide an opening for new perspectives upon, and analyses of, this much neglected but important area of social justice. Of course, the similarities between the criminal justice and the asylum appeal contexts should not be overstated - the countervailing political agendas and the respective burdens of proof are quite different, and in theory at least the AIT is an adjudicatory body which is less formal and adversarial than the punishment-oriented criminal courtroom. However, examining the parallels and dissonances across these two arenas remains instructive. Factors which have been shown to impinge upon a woman's perceived credibility in a rape trial, such as delay in reporting, inconsistencies in the rape narrative, and lack of emotion²⁸ could be compounded in the asylum context by a complex nexus of issues that may intensify women's struggles to be heard and believed. As well as the difficulty of facing and reporting the incidence of rape, asylum-seeking women may experience other problems including: difficulties in translation and interpretation; family pressure, shame and expectations regarding 'appropriate' behaviour; a lack of culturally sensitive resources or support networks; a lack of recognition of culturally specific means and methods of storytelling; and the inappropriate application of a Western (and, in many cases, ex-colonial) lens to non-Western incidences of war, political and sexual violence and other forms of persecution.

A feminist analysis of the criminal justice treatment of rape can only be of use in the asylum context if nuanced attention is also given to the ways in which discriminatory gendered stereotypes intersect with stereotypical and discriminatory beliefs about race,

²⁶ Lees, *Carnal Knowledge: Rape on Trial* (London: Hamish Hamilton, 1996); Temkin, above note 2; Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford: OUP, 2001).

²⁷ Ceneda & Palmer, above note 22; BWRAP, 'Misjudging Rape: Breaching Gender Guidelines and International Law in Asylum Appeals' (Crossroad Books, 2006).

²⁸ Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the Reasonable Rape Victim' in Eastaale (ed.) *Balancing the Scales: Rape Law Reform and Australian Culture* (Sydney: Federation Press, 1998); Temkin, 'Prosecuting and Defending Rape: Perspectives from the Bar' (2000) 27 *Journal of Law and Society* 219; Ellison, 'Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases' (2005) 9 *Evidence and Proof* 239; Ellison & Munro, 'Reacting to Rape: Exploring Mock Jurors' Assessments of Complainant Credibility' *British Journal of Criminology*, forthcoming.

ethnicity, culture and nationality. Making sound credibility judgements in this multifaceted socio-political context may seem an impossible task, particularly as each of these factors may interact with the others in unexpected or unpredictable ways. Bearing these complexities in mind, and subject to limits of time and scale, we have attempted here to design a study that permits greater discovery of the complex ways in which the female asylum applicant who reports having been raped, her legal representative, and the judges and decision-makers tasked with deciding her fate, negotiate these intersections.

Methodology

Unlike much previous research on asylum, which has tended to focus solely on the initial Home Office decision-making stage, this pilot study – driven by its interest in the possible parallels and dissonances with the criminal justice trial – devoted specific (although not exclusive) attention to the operation of the Asylum and Immigration Tribunal. For ease of access, and to allow for the project to be concentrated (albeit limited in size), the research was restricted to one (urban) geographical centre. In addition, given the prevalence of male-to-female sexual victimisation and our awareness of the need to subject the legal treatment of male victims of sexual assault to its own contextually sensitive analysis, this study focuses on asylum cases that involve women who have alleged rape. Early in the planning process, the authors took the decision not to interview the women claimants themselves. This meant that we were not able to directly access women's experiences of how they had been treated in the AIT, and in particular their reflections upon the ways in which their narratives had evolved during the appeal process and upon the ways in which their credibility had been assessed. However, we felt that there were ethical problems involved in trying to interview these women. For many, talking about these issues is shameful, difficult and traumatising. Moreover, by the appeal stage, these women have already had to tell their stories numerous times. We felt that asking them to describe such experiences again, potentially at a cost of further trauma, would not be necessary. Given that we were interested in the legal treatment and discussion of the issue of rape, we felt this could be addressed by looking at case files, interviewing legal representatives and judges, and by observing the (public) AIT hearings.

Between June 2007 and February 2008, we interviewed six legal representatives, all of whom had extensive experience in representing female asylum claimants. Although approaches to Home Office personnel were made, they were – unfortunately – unsuccessful. We also interviewed one asylum adjudicator, and two interpreters who had been involved in asylum appeals. Finally, we interviewed four workers involved in the UK asylum support sector. All interviews were semi-structured, and lasted between one and two hours. Some interviews were recorded, while some interviewees requested that handwritten notes be taken. As a collective, these thirteen interviews allowed the authors to inquire about a range of experiences of handling asylum cases where a claim of rape was involved, as well as to uncover broader insights about the extent of the problem and the ways in which the system could be improved. Gaining access to individual asylum cases was difficult (particularly given the constraints of time and locality), but we were able to observe in full one AIT hearing in which rape was an issue and secured access via the legal representative involved to the accompanying case files. The findings discussed below must be read, then, in light of this relatively modest sample. While this is a small and geographically limited study, and as such cannot claim any generalisability, it has yielded some rich and important data that both supports the limited pre-existing literature on the predicament of female asylum claimants who disclose having been raped

in their country of origin, whilst highlighting the need for further critical inquiry and illuminating the avenues along which such future research might usefully be directed.

Findings

Our findings indicate the existence of four broad sets of issues that both provide a backdrop for and often influence - if not determine - the ways in which women's claims of rape are met by asylum decision-makers: (1) the timing and manner of women's initial disclosure of rape; (2) the social and legal framework in which rape narratives evolve; (3) the particularities of the physical and procedural AIT environment; (4) the discourses of (in)credibility that are at play. These will be discussed in turn below, with specific attention being drawn – in line with our initial thesis - to the apparent parallels and dissonances in the treatment of rape at the AIT vis-à-vis the criminal justice system.

Disclosure and Under-Reporting

Concerns regarding the under-reporting of sexual assault in domestic criminal justice systems are well-documented.²⁹ Such difficulties, particularly those connected to feelings of shame, discomfort at the prospect of recounting events to others, and a distrust of those in positions of authority, might well be compounded in the case of asylum-seekers.³⁰ This is particularly so in situations where the cultural norms of the originating state privilege female sexual purity/fidelity as an index of a woman's (or family's) honour, or where legacies of state-sponsored corruption or war have been encountered. In the present study, interviewees emphasised that the willingness of an asylum-seeking woman to disclose an experience of rape will be contingent upon the interaction of a range of factors, including the identity of the perpetrator, the conjunction of the sexual assault with other forms of violence, and her trust in the official personnel of host countries. The cultural meaning of rape and the broader context of male/female relations in their country of origin was also seen to be important – with one NGO worker recounting two separate instances in which she contacted women who disclosed having been raped and “both had the same reaction of saying ‘I didn’t think that you would call back because you would probably be disgusted or think that I was crazy to tell such horrible things’.”

In a context in which Black Woman Against Rape found that 20% of the asylum-seeking women surveyed had not felt able to disclose an experience of rape prior to Home Office consideration of their case, it would seem that, for many women, disclosure constitutes a ‘leap of faith.’ It requires both a non-judgemental environment and the establishment of a relationship of trust with those dealing with her application. As one interviewee put it, disclosure requires “a safe environment in which you are not going to be judged...and confidentiality is very important.” Despite this, recent research has intimated that some asylum claimants may feel unable to tell the Home Office what has happened to them (even though they wish to), either because the interviewer seems more

²⁹ See, for example, Regan & Kelly, ‘Rape: Still a Forgotten Issue (London: Child and Women Abuse Studies Unit, 2003); Myhill & Allen, ‘Rape and Sexual Assault of Women: Findings from the British Crime Survey,’ Home Office Research Findings 159 (London: Home Office, 2002).

³⁰ See Bogner et al, ‘Impact of Sexual Violence on Disclosure During Home Office Interviews’ (2007) 191 *British Journal of Psychiatry* 75 – In this (small) study involving UK asylum claimants, significant barriers to disclosure of traumatic events were identified. In the case of claimants who suffered sexual violence, these included feelings of shame, disassociation and incomplete memories and intrusive flashbacks, which made giving a coherent and immediate account to the Home Office difficult.

concerned with factual details about their country of origin or journey to the UK or because the claimant (rightly or wrongly) suspects a sceptical attitude from the outset.³¹

When disclosure does occur despite such cultural norms and (perceived) institutional barriers, interviewees in this study emphasised that a woman's choice of terminology may be significant. Rather than talking openly in terms of sexual violation, asylum-seeking women who intend to report rape may, it seems, use euphemisms such as 'he hurt me' - or invoke more opaque references to suffering from 'back problems' after an attack - sometimes conjoined with non-verbal cues. As a result, recipients of such disclosures must be sufficiently sensitive to such subtleties, seizing available opportunities to carefully probe further in order to secure a more forthright account. What is more, there is a risk of further difficulties where a woman's story is provided initially in a foreign language and translated into English since the involvement of the interpreter as intermediary may mean that veiled references to rape are, literally, lost in translation. Full disclosure may also be hindered if a woman's sense of shame / discomfort is accentuated by the perception that the interpreter, as a member of the community of origin, will judge her harshly. In such situations, there is also evidence that some women may fear that stories reported to an interpreter will not be treated confidentially, but will in fact be fed back to other members of their community of origin who are now living in the UK.

To facilitate initial disclosure, then, considerable care must be taken by Home Office representatives, as well as solicitors, welfare officers and interpreters involved in working with asylum claimants. Developments in the criminal justice system designed to facilitate rape disclosure include increased training of police and prosecutors, the standardised use of gender-matched investigators, the development of specialist sexual assault referral centres, and the instigation of 'special measures' to alleviate the stresses associated with testimony. These have not offered a panacea - either in terms of conviction rates or the treatment of vulnerable witnesses. But there is little doubt that they have yielded some important improvements, particularly for individual women who report sexual violence. At the same time, it seems that more might be done to transfer these initiatives into the asylum context in a systematic way. For example, while it was often pointed out by interviewees that "for some women, it will make a huge difference that they can choose and ask for a female case worker," research suggests that this does not always happen. Moreover, women asylum-seekers may be interviewed in the presence of their children, despite the fact that this "impedes women's ability to have a quality interview, either through distraction or because they cannot tell their full experiences in front of the(m)." ³²

Critics may argue that the environmental conditions that are conducive to disclosure are in tension with broader socio-political asylum policies in which there is a pressure to uncover 'bogus' claims and to process applications with maximum speed and efficiency. Indeed, some interviewees suggested that barriers to disclosure could be augmented rather than diminished by the New Asylum Model's radical streamlining of timescales for initial decision-making. For example, it was argued that childcare during interviews would become more problematic - as one respondent explained, "women have just arrived and don't have time to create a network of support, a network of friends, and they very often

³¹ Bogner, above note 30.

³² Asylum Aid, above note 5 at 3. One regional UK Borders Agency, in liaison with local voluntary sector agencies have identified this as a source of concern and have taken steps to provide childcare in order to facilitate a more open and effective interview. This has been treated as a pilot scheme by other regions and has not yet been implemented nationally.

don't have family with them, so the only solution is to have the children with them". More generally, concerns were expressed about the lack of flexibility within the New Asylum Model, particularly in cases involving disclosures or suspicions of rape. As one interviewee put it, "things under NAM are really swift and I can imagine cases where people have not been around long enough to be comfortable to disclose sensitive information about an assault that makes them feel vulnerable...and by the time you feel safe you might actually have been removed from the country." Echoing this specific concern, another interviewee commented: "you cannot expect someone who's been here a month to go into a hostile interview environment and disclose everything, it's crazy."

Seen but not Heard? Narratives of Sexual Violence and Asylum

The imputed trustworthiness of a witness will depend upon her ability to present her statement in a narrative form and in a coherent, as opposed to fragmented, manner.³³ In the context of rape disclosure, as discussed above, there are a number of potential obstacles to such coherence. Some claimants will experience discomfort and shame (which may be amplified by their cultural orientation) as well difficulties in recording, recollecting and recounting traumatic events. Criminal justice commentators have identified further obstacles including the rigid, interrogative, closed question and direct answer format of testimony in pre-trial and trial proceedings, as well as the overall adversarial environment of the courtroom, which can be both hostile and intimidating to victims, who typically lack any independent representation.³⁴ While direct correlations between the AIT and the criminal justice context would be inappropriate, there can be little doubt that - akin to the courtroom - the opportunities for asylum claimants to recount their narratives (in relation to the rape or, indeed, more broadly) may be circumscribed by the processes and protocols of Home Office and AIT decision-making.

Opportunities for asylum applicants to produce an oral narrative are limited, since the focus is upon responding to questions asked without scope for explaining other circumstantial factors that the official may not recognise as important or relevant.³⁵ This mode of extracting information may prevent claimants from situating their experiences in the social, economic, political or personal contexts that are integral to their intelligibility. As Blommaert has argued, this risks reducing the applicant's biography to that portion of her life that "can be written in the shape of a travelogue" and that "can be documented by means of place descriptions and timeframes."³⁶ Throughout the asylum application, this 'travelogue' is repeatedly remoulded and re-narrated (by translators, lawyers, welfare workers and experts), generating a *text trajectory* that is beyond the control - and often beyond the understanding - of its central character. Despite this, when it comes to decision-making, as discussed below, the applicant's credibility continues to be assessed against this narrative as if it represents a single text attributable to her as author.³⁷

³³ Lind & O'Barr, 'The Social Significance of Speech in the Courtroom' in Giles & St. Claire (eds.) *Language and Social Psychology* (Oxford: Basil Blackwell, 1979).

³⁴ See, for example, Lees above note 26; Temkin above note 2; Ellison, above note 26; Adler, *Rape on Trial* (London: Routledge & Kegan Paul, 1987).

³⁵ Kalin, 'Troubled Communication: Cross-Cultural Misunderstandings in the Asylum Hearing' (1986) 20 *International Migration Review* 230 at 232.

³⁶ Blommaert, 'Investigating Narrative Inequality: African Asylum Seekers' Stories in Belgium' (2001) 12 *Discourse and Society* 413 at 442.

³⁷ Blommaert, above note 36 at 438.

In the present study, the (in)ability of the asylum-seeker to narrate her experiences in her own words - and on her own terms - was a common concern. While interviewees emphasised the importance of “a very detailed statement” - and of a “very detailed narration” of the rape in particular – it was lamented that the various structural pressures within the asylum system mean that “sadly, lawyers don’t always have the time to wait for a woman to be ready to talk.” It was suggested that representatives are rarely able to work with claimants on a sustained basis in order to substantiate surrounding contexts, flesh out omissions and/or test inconsistencies in their initial accounts, and that this, in turn, negatively impacts upon the prognosis for the application. A number of interviewees expressed dissatisfaction with what they saw as rigid and formulaic procedures adopted by UK Border Agency case owners when eliciting an applicant’s narrative. As one support worker interviewee put it, “you don’t make a statement, you don’t tell your story, you are asked questions in a particular order and you answer those questions. And things might be covered in a sort of neat pattern but it is not the same as ‘tell me your story’....It’s not a format that will elicit a story from a vulnerable person.”

Related to these concerns over the structural format of the initial asylum interview, many interviewees also expressed concerns over what they perceived to be a reluctance on the part of some of the gatekeepers of refugee status to engage with the detail of the alleged rape. Echoing previous research in which “everybody who disclosed a history of sexual violence reported being prevented from talking about it further in the interview by the Home Office,”³⁸ interviewees here suggested a tendency amongst some officials to ‘steer clear’ of the detail of rape claims. It was asserted that some women were leaving their formal interviews “without having really fully explained everything that has happened.” In the case involving rape that we observed at the AIT, there was no space given for discussion of the sexual assault that provided the central reason for the applicant’s flight from her country of origin. Indeed, despite the fact that the applicant at initial interview had identified a gang rape as the trigger for her departure, the Home Office refusal letter stated that she had not given a reason for leaving. While this might be seen as a simple error, the lack of acknowledgement of the traumatic details of this applicant’s narrative sits in the broader context of this alleged official disengagement with the issue of rape.

Notably, the reasons offered by interviewees for this reluctance to discuss claims of sexual violence varied. For some, it was best understood as part of a broader Home Office strategy to keep the focus on the factual elements of the ‘travelogue’. For example, an account was given of a female claimant who – much to her bewilderment and frustration – was not asked during her interview to account for how she found herself imprisoned or to give details of the rape that she alleged had occurred there. Instead, she was required to answer questions about the emblem of her country of origin and the colours of its flag. A consequence of this strategy, respondents pointed out, was the neutralisation of the emotional and human impact of the foundational story of the asylum-seeker. In one interviewee’s words, foreclosing the enquiry in relation to the sexual assault ensured that “the whole story comes out flat, unemotional.” By contrast, for other interviewees, this reluctance to engage with the circumstantial detail of the alleged abuse was grounded variously in a (possibly misguided) sense of chivalry towards the female claimant, a squeamish unease at discussing sexual assault, or a self-protective instinct to reduce the psychic stresses associated with hearing such traumatic accounts.³⁹

³⁸ Bogner et al, above note 30 at 79.

³⁹ See also Rousseau et al, ‘The Complexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-Making Process of the Canadian Immigration and Refugee Board’ (2002) 15 *Journal of Refugee Studies* 43.

While interviewees often emphasised that changing the closed question and answer format of interviews might afford asylum claimants an increased opportunity for narration in some cases, many appreciated that this would not, in itself, redress all pertinent barriers to communication. Discursive practices and modes of free-flowing narration are often linguistically and stylistically culturally-specific, bringing with them their own modes of exclusion. This, in turn, may make it difficult for non-Western others, immersed in their unique 'home narratives' and conventions of story-telling, to provide the logically sequential account expected by UK asylum decision-makers. In addition, of course, there will also remain difficulties of mediation due to the role of interpreters in the communicative process. Many of those involved in this research emphasised the importance of allowing claimants to tell their story 'in their own words'. However, where the asylum-seeker's own language is not English, the words in question are inevitably (at best) a close but imperfect replication of the original. As one interviewee put it: "it's kind of really amazing how easy it is to get the wrong end of the stick...I've got my perspective, my background, my experiences and then someone else is speaking it from a totally different culture: misunderstandings are really, really easy and that can be exacerbated through an interpreter sometimes." Some filtering and interpretation is arguably unavoidable when a person's words are translated from one language to another by a third party, particularly when cultural differences in linguistic emphasis, terminology and style are at play. But there is some evidence to suggest that in the context of sexual violence there may be other factors which mediate the ways in which women's stories ultimately emerge. For example, it was suggested in this study that some interpreters may, in certain cases, elect to supplant direct for modified translations. As one interviewee put it: "when I'm translating, I tend to try to – I mean obviously what it is, you can't get away from it – but when you're going over and over, I might try to modify the words slightly, talk about, you know, aggression or sexual aggression, so that you're not constantly saying this word ['rape'] which is...it's a horrible word, you know."

The AIT Hearing Environment

While many of the opportunities for disclosure and narration come at the early stages of the asylum process, high rates of initial refusal and subsequent appeal mean that the AIT also provides an important forum in which appellants can be given a fresh opportunity to recount their stories. It has been argued that genuine communication is achievable only in asylum hearings that "avoid an atmosphere of intimidation" and "use an interrogation technique which lets the asylum-seeker determine what he or she regards as relevant statements."⁴⁰ The AIT is a non-adversarial tribunal which, in principle, is less formal and intimidating than, say, a criminal justice court. In its operation, however, there appears to be remarkably little to demarcate the purportedly non-adversarial format of the AIT from more conventionally combative trial environments. This experience is paralleled, moreover, by research in Canada, which concluded that despite a formally non-adversarial process, asylum officials often adopted highly interventionist and aggressive approaches, which placed claimants in a double-bind between "the explicit discourse of 'we are here to protect you'" and "the implied construing of the refugee as a liar."⁴¹

Whether officially acknowledged to be adversarial or not, there was a strong sense amongst several interviewees in the present study that, not unlike the criminal justice

⁴⁰ Kalin, above note 35 at 239.

⁴¹ Rousseau et al, above note 39 at 66.

trial, the AIT environment was intimidating for, and hostile to, many asylum-seekers. Of course there are important differences between the AIT environment and the criminal courtroom. Amongst other things, for example, respondents cited the way in which the privacy that could be requested and secured throughout AIT hearings had generated a “peculiarly reaction-less” environment.⁴² At the same time, though, a number of important parallels were repeatedly remarked upon. Although some participants commented positively on the professionalism of the AIT more generally – noting that “there is a sense of being treated with politeness and respect amongst the staff, which is quite different from the (criminal) court” – a significant number were more critical. One interviewee stated that she had been “horrificed” at the treatment that some of her clients had received at the hands of Home Office Presenting Officers at the AIT. She insisted that “some of the questions and the way they phrased it, they’re just really aggressive and confrontational and unprofessional: they don’t treat the client with any respect at all.”

Although not all respondents displayed this strength of disapproval, it was widely acknowledged that the tribunal itself was, in fact, largely adversarial in its orientation. Interviewees commented that “technically it’s not adversarial but it *feels* adversarial,” and often supported this with cases in which an asylum claimant had been challenged in ways reminiscent of cross-examination during a criminal trial. Likewise, respondents often reported the negative reactions to the tribunal environment that had been recounted to them by claimants, including those who ultimately secured asylum. As one put it: “on cross-examination at the AIT, they often find it quite, very harsh, the way they are cross-examined and attacked on every point, and they feel, you know, being in front of the judge, they find it most difficult I think being put on the spot and having all that they have said, and being told ‘you are not telling the truth’...they find that quite horrible.”

Conversely, paralleling some of the comments made in relation to disclosure and initial reporting of rape, some interviewees also identified a counter-trend at the AIT whereby Home Office Presenting Officers simply avoided questioning on the rape altogether. As one respondent put it, “there is probably a tendency for them not to probe too much, not to question them too much on that.” Once again, the explanations for this varied. Some Presenting Officers might have felt that it was unnecessary to put the claimant through the trauma of verbally recounting events adequately captured in prior written submissions. Or, it may be that the fact of rape itself was accepted but the claim of fear of future persecution was not. However, it was also suggested by some interviewees that failure to interrogate the rape might have been part of a deliberate strategy designed to divert attention away from the alleged abuse, and thereby undermine the asylum claim. Ignoring the rape claim firstly denied the woman any opportunity to display the kind of emotional response that might incite the sympathy of the immigration judge; and secondly, it focused attention on other, minor factual details of the narrative which, if found to be inaccurate, would also taint credibility in relation to the rape. These two explanations were inter-twined in the following comment by one interviewee: “it’s easier for them [the Home Office Presenting Officer] to tease away strands at the periphery of the claim rather than ask about an incident which, if they are telling the truth, they cannot hide the emotion...and it’s very compelling for a judge to listen to that.”

Credibility

⁴² Although AIT hearings are normally public, a request for privacy can be made. Rule 54(3)(b) of the 2005 Asylum and Immigration Tribunal (Procedure) Rules states that any or all members of the public may be excluded from a hearing (or part thereof) where ‘necessary to protect the private life of a party’.

Credibility lies at the heart of any claim to recognition as a victim, whether in the criminal justice or asylum context. Traditions of oral testimony have promoted assessment not only on the basis of what is said, but also on how it is presented in the courtroom. In the context of domestic rape prosecutions, there has been increasing concern about the ways in which stereotypes of ‘appropriate’ victim behaviour influence determinations of complainant credibility.⁴³ In asylum cases involving a claim of rape, credibility also has a particular significance, not least since there may be limited corroborating evidence. Here, however, concerns about the false reporting of sexual assaults may be compounded by racialised beliefs about the (un)truthfulness of ‘bogus’ asylum claimants. Critics have argued that the socio-political construction of ‘refugeehood’ supports the division of ‘deserving’ (credible) from ‘undeserving’ (incredible) applicants. Moreover, it seems that barriers to credibility may be further compounded by obstacles relating to inter-cultural communication and by difficulties associated with “judging the possibility and probability of events in societies different from one’s own.”⁴⁴ As one interviewee in the present study put it: “some of the stories you hear are almost incredible but you have to keep in mind that you’re not in a war situation, and you just don’t know what could happen.”

It is not possible in the space available to interrogate each of these triggers for credibility assessment. In this section, however, we examine three particular aspects of a claim of rape which this pilot suggests may have an impact: namely late disclosure; omissions or inconsistencies in the rape narrative; and the demeanour of the applicant. Of course, in asylum, as in criminal justice, the mere fact that a female claimant discloses an experience of rape does not – and should not – give rise to any presumption of veracity. Indeed, there may be circumstances in which it is appropriate for negative inferences to be drawn from delayed disclosure, narrative inconsistency or demeanour. At the same time, however, a number of explanations might be offered that would remain perfectly compatible with a truthful disclosure. As such, the challenge for asylum decision-makers (at both initial and appeal stages) is to resist any temptation to see these factors as necessarily indicative of fabrication, and to find instead an appropriate mechanism by which to evaluate their relevance within the complex context of each and every case.

Late Disclosure

The perceived credibility of a female claimant who alleges rape as an element of her persecution in her country of origin may be particularly precarious where she displays any supposedly ‘non-conforming’ behaviour, such as delay in reporting. While “late disclosure or non-disclosure during Home Office interviews does not necessarily imply a lack of honesty,”⁴⁵ there is evidence to suggest that it may present an obstacle to asylum claimants, both in relation to the specific allegation of sexual assault and, in turn, in terms of the perceived veracity of their overall persecution claim.⁴⁶ A number of interviewees in the present study echoed the sentiment expressed by one respondent who insisted that “if they [the asylum-seeker] want that [the rape] to be part of their claim and they don’t disclose that and then a year later they come back and say,...well they’d just be called a liar.” Concrete illustrations were often provided in support of this claim. An interpreter recounted, for example, one AIT case in which a woman disclosed having been raped only after her husband’s claim for asylum had been rejected. Here “it was mentioned very

⁴³ Ellison & Munro, above note 28.

⁴⁴ Kalin, above note 35 at 236.

⁴⁵ Bogner et al, above note 30 at 79.

⁴⁶ See also Asylum Aid, above note 5; and Rousseau et al, above note 39.

clearly in court by the Home Office representative that there was a strong suggestion that she might be making this up – you are only saying this now your husband has been refused....and even though she had said that she had been raped by police, there was a direct question said to her asking why she didn't complain to the police that she had been raped." Conversely, however, it should also be emphasised that some interviewees – particularly those experienced in dealing with sexual violence themselves – indicated that immigration judges were increasingly aware of the limited probative relevance of late disclosure, particularly in a context in which women often attach their asylum claims to their husbands' and in which disclosure of rape is over-laden with cultural taboos.

Omissions / Inconsistencies

Delayed disclosure of an experience of rape can be understood as being just one instance – potentially among others – of an omission, or narrative inconsistency, in the person's substantive account of their overall asylum claim. There is evidence that such omissions or inconsistencies can have a detrimental impact upon credibility assessment in the criminal justice context, and there is reason to suspect that the same may also be true with regard to asylum. Displaced persons may experience a sense of 'culture shock' upon arrival in a destination country, which can seriously impair their ability to make a forceful statement: "such an asylum-seeker may speak in a confused, nervous, fragmented and unconvincing manner not because he or she is lying but because of the anxiety and insecurity caused by the difficulties of life in an entirely new social and cultural environment."⁴⁷ As discussed above, the anxiety associated with this re-settlement and transition can interact with obstacles to cross-cultural communication in various ways, potentially setting the asylum seeker's narrative apart from the expected conventions of its assessors. At the same time, the experiences of trauma that the asylum-seeker has suffered can alter her perceptions of time, distort reports of sequences and generate memory blocks that may be either temporary or permanent. This, in turn, gives rise to claimant narratives that are often inaccurate in some measure, incomplete or subject to revision over time. It has been noted that such characteristics, though not necessarily indicative of falsity, "are easily interpreted as lack of credibility in a legal setting."⁴⁸

In the context of the present study, there was a strong consensus amongst interviewees that the existence of even minor inconsistencies in the claimant's account may well be relied upon to argue against the credibility of substantive claims. As one interviewee explained, recounting the events of a tribunal hearing that she had attended, "she [the asylum applicant] was asked questions involving time and details, kind of – I would say – in order to bring out inconsistencies." Even where these inconsistencies related to seemingly irrelevant details, a number of respondents emphasised that they would ultimately have the effect of 'tainting' the claimant's credibility in regard to the more central elements of her account. As one respondent commented: "credibility is something that's taken as a whole...if there's one inconsistency, it unravels the whole thing...(even) something we would say is peripheral to the main claim is enough to unravel the whole thing." At the same time, though, it should be emphasised that this perspective was not in fact universally held – thus, as one immigration judge commented, "sometimes, you can get people who will concentrate on just every detail and say that if you can't remember a particular date then it denies credibility...(but) consistency doesn't necessarily mean credibility...in some cases, you know, having a degree of inconsistency

⁴⁷ Kalin, above note 35 at 232.

⁴⁸ Rousseau et al., above note 39 at 49.

makes it more credible.” What this suggests, then, is that while narrative consistency and fullness may indeed be perceived to be important markers of credibility for some, for others what may be more important will be the way in which the claimant delivers the overall account. But in the context of the asylum hearing this too can be problematic.

Calm and ‘Proper’ Demeanour

It is widely accepted, at least in theory, that a person’s state of mind after having experienced traumatic events may be unpredictable. Being in attendance at a hearing the outcome of which holds such personal importance for the asylum-seeker (whether or not she is required to directly recount the events that led up to her claim) may lead to emotional reactions or signs of distress that can be misinterpreted by decision-makers. The unfamiliar and intimidating context, combined with symptoms of trauma such as laughter or lack of facial expressions, produce “anxiety [that] is often expressed through cultural idioms unfamiliar to the decision-maker, can result in hesitance or contradiction, and may be interpreted as a lack of credibility.”⁴⁹ Thus, commentators have identified the need - in both the asylum and criminal justice contexts - for applicants to strike a balance in their demeanour between dignity and suffering: she must display “appropriate emotion at appropriate moments” but too much emotion can be as incredible as too little.⁵⁰

The findings of this pilot study reinforce the relevance of this dilemma in the UK asylum context. One aspect of ‘proper’ demeanour identified as potentially problematic by interviewees was the applicant’s ability to make eye contact with the questioner. As one put it, there has to be an awareness of “the effect that even cultural differences can have on credibility and such as, you know, I’m looking to you eye to eye but to do that in certain cultures would not be regarded as polite and the woman would look down in deference but in a western society to look down would be interpreted as being shifty and not telling the truth.” Many of those working directly with asylum-seeking women who claimed to have been raped also emphasised that there are a wide range of emotional responses to sexual violence: “you think they might be angry or crying, but often it’s just very, very calm.” At the same time, these respondents were certain that such calm demeanour would be unlikely to work well for the claimant in the tribunal context: “some people are very calm, some people are hysterical and, you know, this kind of calmness can be seen as, well ‘they’re making it up’ or ‘they’re thinking too much about it’.” For this reason, some admitted to asking a woman difficult and emotional questions during the appeal hearing (though not necessarily about the rape itself) in order to make visible (and hence more credible) the experience of trauma suffered by the applicant.

Others who sought to bolster the claimant’s credibility adopted alternative strategies. Enrolling the woman in post-traumatic counselling was often recognised as offering a potentially valuable corroborative tool. But the cultural-specificity of counselling and the difficulties this could present for the asylum-seeker were also acknowledged. As one interviewee put it, “counselling is a very western concept...going to speak to a stranger about having been raped, especially in a culture in which having been raped is a shameful thing.” At the same time, the failure of those tasked with deciding asylum claims to appreciate these complexities was also specifically lamented by many of the interviewees and was starkly reflected, for example, in one case that was recounted in which “the woman claimed she had been raped but she refused counselling because she didn’t want

⁴⁹ Rousseau et al, above note 39 at 51.

⁵⁰ Spijkerboer, above note 12 at 56.

to talk about it, and thought that she could cope without it”. Here, it was reported, the judge disbelieved the woman’s claim to have been raped precisely because she had opted not to go for counselling which, he felt, was inconsistent with genuine victimisation.

Similarly, another respondent told of a case in which, very shortly before the commencement of the AIT hearing, the asylum-seeker had been advised that her female solicitor was not going to be able to attend. The claimant had been asked if she would accept representation by a male replacement. Subsequently, the fact that the appellant had agreed to be represented by a man was “cited against her” on the basis that “if she had really been this vulnerable, raped woman, why would she accept this male solicitor.” This presupposes a particular emotional reaction to victimisation that may, in fact, be ill-fitting for many women, and as such feeds into questionable hierarchies of ‘appropriate’ victim responses. The complex intersection between these gendered norms of ‘appropriate’ victim reaction and the broader processes of cultural and racial ‘other-ing’ that are in operation in the asylum context must, of course, also be acknowledged.

Concluding Comments

Those seeking asylum whose claims are founded on rape face a particularly complex interplay of socio-political and legal barriers to justice, and are vulnerable and invisible within both current legal discourses on rape as well as studies of asylum more generally. The pilot study upon which this article draws is limited in its scale, and it is particularly important to bear in mind that – unfortunately – no UK Border Agency personnel were involved. That said, amongst the various stakeholders that were interviewed, a strong consensus did emerge that there are presently a number of potential obstacles which may make it difficult for asylum-seeking women in the UK to disclose and describe instances of previous sexual violation, as well as to have those claims accredited during the asylum process. These obstacles cannot simplistically be reduced, however, to one causal source, be it attitudes towards sexual violence or asylum policy, cultural norms of sexuality, structural processes and decision-making procedures, or racial/gender power disparities.

For asylum-seeking women who claim to have suffered or to fear sexual violence, there are clearly many parallels with the seemingly intractable problems faced by women who report rape in the criminal justice context. Equally, however, there are also a number of context specific hurdles faced by women in the asylum context, which make the question of social justice here a uniquely troubling one. Indeed, there is also a sense in which – for the many barriers that women might face in this context – there will be some situations in which the relevance of the rape itself, and more specifically the need for it to be established and believed by others, will ultimately be minimal. In the case involving rape that we observed at the AIT, for example, discussion of the facts of the rape did not feature, and the question of credibility arose solely in relation to the applicant’s ethnic status. This was explained by one respondent: “if, for example, you have a Bajuni from Somalia and there are some inconsistencies in an alleged rape then that isn’t going to matter too much if you can prove their ethnicity.” While this provides welcome protection to some vulnerable groups, it should not detract us from developing further insights into what is going on in the spectrum of asylum cases involving sexual violence.

The complex intersection of issues relating to gender, race, nationality and culture within the general climate of asylum require us to give more nuanced attention to the plight of vulnerable women who look to the UK as a sanctuary from sexual assault. The intricacies of the web of interwoven credibility issues which impact upon the development of rape

narratives clearly require further and careful analysis. While the research conducted in this pilot study offers, we hope, a contribution towards our understanding in this area, significantly more must be done to uncover and evaluate the role that assessments of credibility do, and ought to, play in asylum decision-making. Amongst other things, systematic tracking of a large number of cases throughout the process is required to chart the ways in which narratives of rape are disclosed, mediated, translated, questioned, challenged, bolstered and evaluated by the various actors involved; and critical reflection on the lenses through which adjudicators filter and make sense of the experiences of ‘others’ ought also to be a key priority for future research, and activism, in this area.